Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
The Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting To Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers	)	PS Docket No. 11-82

COMMENTS OF METROPCS COMMUNICATIONS, INC.

Carl W. Northrop
Andrew Morentz
Telecommunications Law Professionals PLLC
875 15th Street, NW, Suite 750
Washington, DC 20005
Telephone: (202) 789-3120
Facsimile: (202) 789-3112

Mark A. Stachiw
General Counsel, Secretary
& Vice Chairman
2250 Lakeside Boulevard
Richardson, TX 75082
Telephone: (214) 570-5800
Facsimile: (866) 685-9618

Its Attorneys

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of The Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting To Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers	)	PS Docket No. 11-82

COMMENTS OF METROPCS COMMUNICATIONS, INC.

MetroPCS Communications, Inc. ("MetroPCS"),[1] by its attorneys, hereby respectfully submits its comments on the *Notice of Proposed Rulemaking* ("*NPRM*") released by the Federal Communications Commission (the "FCC" or "Commission") in the above-captioned proceeding.[2] In the *NPRM*, the Commission proposes to enact additional regulatory requirements on broadband Internet service providers pertaining to outage reporting. As it did in response to the other request for comment that gave rise to the *NPRM*,[3] MetroPCS strongly opposes the imposition of additional regulatory burdens on broadband Internet service providers, particularly wireless providers, because such burdens are unnecessary, do not reflect the

[1] For purposes of these Comments, the term "MetroPCS" refers to MetroPCS Communications, Inc. and all of its FCC-licensed subsidiaries.

[2] *The Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting To Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers, Notice of Proposed Rulemaking*, PS Docket No. 11-82 (rel. May 13, 2011) ("*NPRM*").

[3] *Effects on Broadband Communications Networks of Damage to or Failure of Network Equipment or Severe Overload*, Notice of Inquiry, PS Docket No. 10-82 (rel. Apr. 21, 2010).

technical nature of the Internet, and are not within the Commission's legal authority. In opposition, the following is respectfully shown:

I. PRELIMINARY STATEMENT, INTRODUCTION AND SUMMARY

On July 11, 2011, President Barack Obama issued an Executive Order entitled "Regulation and Independent Regulatory Agencies"[4] which obligates independent federal regulatory agencies, including the Commission, "to take new steps to ensure smart, cost-effective regulations designed to promote economic growth and job creation."[5] The action was intended to strengthen the commitment of government agencies to the "cost-saving, burden-reducing principles" set forth in the President's January 18, 2011 Executive Order entitled "Improving Regulation and Regulatory Review."[6] That earlier order called on federal agencies, *inter alia*, to use the "least burdensome tools for achieving regulatory ends," by conducting both quantitative and qualitative cost/benefit analyses. Unfortunately, the Commission's proposed extension of the Part 4 outage reporting requirements fails to meet the exacting standard set by these Executive Orders. At a time of economic stagnation and serious unemployment, the proposal would divert capital from job-creating endeavors to unproductive regulatory reporting activities, is wholly unnecessary, and is not within the Commission's legal authority.

MetroPCS appreciates, understands and applauds the Commission's efforts to promote reliable and resilient communications systems and to protect critical infrastructure. However,

---

[4] Exec. Order No. 13579, 76 FR 41587 (Jul. 14, 2011), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-07-14/pdf/2011-17953.pdf.

[5] Posting of Cass Sunstein to The White House Blog, http://www.whitehouse.gov/blog/2011/07/11/president-s-executive-order-improving-and-streamlining-regulation-independent-regula (July 11, 2011 at 6:28 PM EDT).

[6] Exec. Order 13563, 76 FR 3821 (Jan. 21, 2011), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf.

MetroPCS' experience with the existing voice outage reporting requirements indicates that they fail to strike a reasonable balance between benefit and cost. For example, the existing requirements that wireless carriers submit three separate reports relating to a reportable outage event – one within 120 minutes, a second within 72 hours and a third within 30 days – is very burdensome.[7] The initial 120-minute report is particularly troubling because it can come due when the carrier is still working to solve the outage problem, meaning that the filing of the report distracts resources from the critical effort to restore public services. Further, these reports do nothing to ensure that the network is any more resilient – rather it is a burden that can be harmful to end-users since a carrier's first obligation is to restore service as quickly as possible – not to file reports. Now the Commission is proposing to extend this burdensome 120-minute reporting obligation, and the follow-up 72-hour and 30-day report requirements to interconnected VoIP service providers, broadband internet access service providers and broadband backbone ISPs.[8] In effect, at a time when the Commission, in compliance with the Executive Orders, should be reviewing the existing outage reporting rules to determine whether the benefits outweigh the significant burdens, the *NPRM* proposes to do just the opposite by extending the rules to whole new categories of service without a clear determination that the benefits to be gained from requiring the outage reports outweighs the substantial burden.

In earlier comments filed in this proceeding, MetroPCS set forth its strong view that "extending the current network outage reporting requirements applicable to voice and paging services would be completely unnecessary and unwise."[9] The market for broadband Internet

---

[7] See 47 C.F.R. § 4.9(e).

[8] See proposed rule sections 4.9(g) and 4.9(h).

[9] Comments of MetroPCS Communications, Inc., 2 (filed August 2, 2010).

service is the model of competition, with consumers having access to multiple broadband technologies, many of which have multiple competitors within in a given technology. This fact forces broadband providers to treat customer satisfaction with the utmost seriousness. If a provider gains a reputation for repeated or prolonged outages, customers simply will seek a new Internet onramp. MetroPCS is an ardent believer that competition, and not regulation, is the path to innovation, and this is a prime instance where the Commission should refrain from imposing new rules and exercise a light regulatory touch.

In addition to the competitive nature of the marketplace, the Internet itself makes data disruptions unsuitable for outage reporting. The Internet is a network of networks, and, as such, a localized disruption ordinarily will simply result in data packets be rerouted to their destination along a different path. At its core, the Internet is designed to promote resiliency and redundancy, and under the proposed rules valuable resources will be wasted reporting on isolated outages that do not actually disrupt any service to the end-user. Furthermore, the Internet's "self-healing" nature makes isolating the precise nature of a service disruption a complicated task. Moreover, since the Internet is composed of many networks, some of which may be unknown to certain participants in routing a packet, it will be impossible for any one carrier to know exactly how or who may have caused a particular disruption. A myriad of outage reports requests might ensue without any resulting benefit to the Commission since it will have no way of correlating them. Further compounding the complexity of the rules that the Commission has proposed is the fact that broadband Internet access is offered to consumers in many different technological flavors, none of which operate in quite the same manner. Therefore, any "outage standard" that the Commission could potentially adopt will necessarily be inequitable among technologies. The

Commission must recognize this fact, along with the fact that such requirements are unneeded, and decline to adopt the proposed rules.

Perhaps most importantly, the Commission lacks the requisite legal authority to adopt broadband outage reporting rules in the first instance. The Commission cites Sections 4(k) and 4(o) of the Communications Act of 1934, as amended (the "Act"), as providing it with authority to adopt the proposed rules. Far from providing an independent basis of jurisdiction, these sections merely instruct the Commission to report to Congress and to investigate communications issues related to the safety of life and property. Although the Commission is instructed to report and investigate, its authority to do so is necessarily limited by its enumerated powers under the Act. The Commission cannot simply invoke an amorphous (and apparently limitless) investigatory and information collection power that otherwise conflicts with the Act, based only on its obligation to provide reports to Congress.

The Commission fares no better with its invocation of ancillary jurisdiction under Title I of the Act. The Commission ignores the fact that that the statutory authority cited in the *NPRM* merely requires that interconnected VoIP providers – not broadband Internet service providers – comply with E911 requirements. Simply because interconnected VoIP carriers utilize the Internet to provide service does not subject underlying broadband Internet providers who are not offering VoIP to additional regulatory reach.[10] The Commission's Title III approach similarly fails. Adopting outage reporting rules under Title III alone would have the paradoxical result of burdening the nascent wireless broadband industry with additional obligations while exempting entrenched wireline incumbents. Surely the Commission cannot intend such a result. Even if the

[10] Even if a VoIP provider also provides broadband Internet access, it would be obligated to provide outage reports only with respect to its VoIP service, but not on the underlying Internet access facilities.

Commission were to pursue such a capricious approach, the sections of the Act cited by the Commission do not provide the necessary authority. Sections 307(a) and 309(j)(3) only empower the Commission to act on a prospective basis under limited circumstances, and are not applicable to the modification of already-issued licenses. Section 316(a), for its part, simply does not apply to general notice and comment rulemaking proceedings such as this one.

With all of this in mind, the Commission should decline to adopt rules requiring network outage reporting for broadband Internet service providers, and instead let the market - which has allowed the Internet to thrive to this point – continue to drive the delivery of high-quality, reliable broadband services to consumers.

II. THE COMMISSION'S PROPOSED OUTAGE RULES FOR BROADBAND INTERNET SERVICE PROVIDERS DO NOT REFLECT CURRENT TECHNOLOGICAL OR MARKET REALITIES

A. Additional Regulation Is Not Needed

The market for broadband Internet access services is highly competitive and offers consumers a wide variety of connectivity technology and pricing options – with new players arriving on the market with each passing year. No one would have imagined a few short years ago that high-speed mobile Internet access would be proliferating to consumers on the go, or that mobile broadband service would be well on its way to becoming a true competitor to wired broadband services. With the vast array of competitive offerings in the marketplace, providers simply must provide outstanding service – which requires them to adequately maintain their networks to avoid lengthy service outages – to remain relevant to consumers. Indeed, in many markets consumers have (or may soon have) a choice among as many as six different facilities-based broadband Internet connectivity options: (i) connections through traditional telecommunications companies, such as digital subscriber lines ("DSL") or fiber-to-the-home ("FTTH") (at least one per market); (ii) satellite broadband (one or more per market); (iii) cable

broadband (at least one per market); (iv) wireless broadband, which may be provided by four or more carriers per market; (v) broadband over power lines ("BPL") (one in many markets); and (vi) wireless ISPs ("WISPs"), which provide crucial broadband services to many underserved rural areas. Further, in many instances, customers may also buy Internet access from resellers, partial facilities-based providers, and from integrated service providers. Thus, it is clear that consumers have a vast array of broadband options from which to choose. As a result of there being so many consumer options, all providers are incented to, and must consistently work to, expand and improve their broadband offerings in order to maintain or improve upon their market share. This is particularly true of mobile broadband providers who are relative newcomers to the broadband landscape. In order to gain a foothold against entrenched broadband players, mobile wireless companies have invested tens of billions of dollars in licenses at Commission auctions and in capital expenditures in recent years in order to become viable players in the competitive broadband Internet marketplace.[11] With competition and investment the norm in the broadband world, market forces already are ensuring that service disruptions are as infrequent as possible. With companies seeking to grow their businesses by serving consumers, in part through minimizing such disruptions, there simply is no need for additional regulation. A provider that forces its customers to suffer extended service outages does so at its own peril, and will not stay in business for long. Accordingly, the market already provides the incentives for providers to provide the highest possible level of Internet access uptime – their very existence depends on it. Moreover, in the uncommon instance where a broadband Internet outage does occur, providers

---

[11] For example, for the period 2008-2010, mobile wireless companies invested in excess of $71 billion in infrastructure alone. *See* "Wireless Industry Capital Expenditures 2008-2010 was More Than $71 Billion," CTIA Blog (May 19, 2011), *available at* http://blog.ctia.org/2011/05/19/wireless-industry-capital-expenditures-2008-2010-was-more-than-71-billion/.

must be free to focus all of their time and resources on solving the problem, not on complying with unneeded additional regulatory requirements. Further, any money spent on building robust regulatory reporting systems would be diverted from the more important priority of ensuring that the greatest number of Americans can connect to high speed Internet access.

The Commission's own findings recognize that consumers have a wide variety of choices for broadband Internet services, particularly among mobile wireless providers. For example, the *Fifteenth Report* on mobile wireless competition reported that 67.8 percent of Americans have a choice among four or more wireless broadband providers, while 81.7 percent of Americans may select among at least three wireless broadband providers.[12] As a result, providers of mobile wireless broadband Internet service (such as MetroPCS) are forced to compete vigorously with one another, particularly in the area of service reliability. Indeed, network quality frequently ranks among the top factors that consumers consider when selecting a wireless provider.[13] If a provider is failing to provide consistently reliable broadband Internet access, consumers will "vote with their feet" and simply switch to another wireless carrier, or, perhaps, a different broadband technology altogether. This is especially the case for month-to-month or prepaid subscribers. For example, a customer who subscribes to MetroPCS' service can choose not to renew his or her service every 30 days without penalty, which provides a powerful incentive for providers to develop and maintain robust systems. Further, many of the newest connected devices, such as tablets, only require a month-to-month service.

---

[12] *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fifteenth Report, WT Docket No. 10-33, FCC 11-103 (rel. Jun. 27, 2011) ("*Fifteenth Report*").

[13] Roger Entner, "When Choosing a Carrier, Does the iPhone Really Matter?" Nielsen Wire (Aug. 10, 2009), *available at* http://blog.nielsen.com/nielsenwire/consumer/when-choosing-a-carrier-does-the-iphone-really-matter/#more-14381.

Notably, the *NPRM* fails to recognize the futility of attempting to adopt "one-size-fits-all" outage reporting regulations for broadband. Given the exceptionally wide variety of broadband technologies employed by service providers, efficient regulations that will work fairly and effectively in this diverse marketplace are virtually impossible to design. Indeed, the Commission properly recognizes that "there are differences in the various architectures of cable, wireline, wireless, and satellite systems employed by broadband Internet access service providers that may affect the delivery of Internet services."[14] With these differences in mind, it makes little sense to seek the adoption of uniform rules that ignore these important technological distinctions. In a marketplace defined by wide-ranging and constantly-evolving service technologies, decisions on how best to prevent and respond to network outages are best left to the stakeholders who are intimately familiar with the intricacies of the unique technologies that they offer.

B. The *NPRM* Does Not Recognize the Technological Realities of the Broadband Internet Service Marketplace

As an initial matter, the Commission fails to recognize that the ability of broadband Internet service providers to pinpoint the sources and nature of network outages is far more limited than is generally the case on legacy circuit switched networks, such as the public switched telephone network ("PSTN"). At bottom, packet data networks, such as the Internet, unlike circuit switched networks were designed to be resilient to disruptions and simply operate differently than does the PSTN. Indeed, the Internet was specifically designed to reroute traffic in the event that portions of the network became disabled, and it is designed with redundancy as a top priority. Due to this redundant design, the outage of a broadband facility is not supposed to

[14] *NPRM* at ¶ 42.

have any effect on the availability of the network to end users (who may never notice that such an outage had even occurred). As the Commission recognizes, "[t]housands of separately administered networks make up the global Internet," and "[a]ny pair of autonomous systems . . . may be interconnected at multiple points."[15] Accordingly, Internet Protocol traffic over the Internet can routinely be rerouted in order to bypass any network issues. Indeed, the *NPRM* explicitly states that "the failure of any one inter-ISP link will cause IP packets to be re-routed dynamically," such that any given "link failure would not necessarily result in the loss of IP-based communications connectivity."[16] Given the "self-healing" nature of the Internet, it is both burdensome and pointless to spend time and resources to prepare reports for broadband "outages" that, in reality, result in no loss of connectivity.

The PSTN, on the other hand, as a circuit switched network largely is a point-to-point network. As a result, it can be highly susceptible to outages of specific facilities or localized traffic congestion, and end-users may find that their ability to access the PSTN may be significantly affected by facilities outages. Importantly, to the extent that a broadband Internet access service is reliant on the PSTN, the underlying telecommunications provider already is under the obligation to report any outages of these baseline facilities. Thus, while outage reporting may be appropriate for the loss of PSTN facilities, the Internet, by its very design, obviates the need to track these types of localized outages.

In addition, the "self-healing" nature of the Internet may create difficulties in attempting to isolate the precise cause of an outage. Because of how the Internet is designed, the cause of service degradations may not be clearly identifiable, particularly in a limited timeframe. The

---

[15] *Id.* at ¶ 53.

[16] *Id.*

NPRM proposes a broad standard of a "loss of generally-useful availability and connectivity," which further exacerbates the problem of precisely identifying network issues. Whereas the degradation or outage of a real-time voice service immediately and negatively impacts the service, a "loss of generally-useful availability and connectivity" can mean many things (say, a five-second delay as an email is rerouted) – some of which may not even be noticeable to the end-user. Accordingly, determining what constitutes a "loss of generally-useful availability and connectivity" in a data environment is considerably more complicated than in the voice context. Indeed, the Commission suggests multiple standards for determining whether such a loss has occurred. The *NPRM* seeks comment on the use of "packet loss, round trip latency, or jitter from the source to the destination host"[17] in order to determine whether a loss of generally-useful availability and connectivity of broadband Internet service has occurred. In addition, the baseline values for each of these proposed metrics may vary significantly depending on user location, destination host location, and many other factors. This is particularly true in the case of mobile wireless providers, whose end-users operate in uncontrolled mobile environments.

Further, unlike the PSTN where carriers generally can ascertain who is handling the traffic, the Internet is a vast network of networks– many of which are unknown to the other providers. This invisible interdependence makes circuit switched network reporting procedures largely useless as a means of determining the sources of outages. For example, an outage on one internet link may not give rise to an outage reporting obligation because it did not trigger the thresholds since the majority of the traffic may be destined to networks other than the one experiencing the failure.

---

[17] *Id*. at ¶ 42.

After conceding that there is a "lack of standardized values for the metrics presented" in the *NPRM*,[18] the Commission proposes certain thresholds for these metrics beyond which an "outage" would be presumed to have occurred. Specifically, the Commission has proposed "packet loss of one percent or more, round trip latency of 100 ms or more, or jitter of 4 ms or more from the source to the destination host in order to trigger outage reporting."[19] Unfortunately, these thresholds bear little resemblance to broadband reality. Regularly meeting these standards will be nearly impossible for many service providers, particularly mobile wireless service providers, meaning that regular operation of these networks will suddenly be considered "outages" under the proposed rules. A test conducted over the Clearwire 4G and Verizon 3G networks in Portland, Oregon confirms this fear. In that test, a technology writer found that average latency exceeded 100 ms in two of the six tested areas for Clearwire 4G service and in every single tested area for Verizon 3G service.[20] Despite these supposed "outages," the author still described himself as "giddy" over the prospect of "harnessing that much bandwidth wirelessly while sitting outside."[21] Those simply are not the words of a consumer suffering a reportable outage. This shines a light on MetroPCS' suspicions that a "one-size-fits-all" approach simply is not realistic. Given the state of competition in the market for broadband Internet access services, it is far better to allow the market to continue to incent stakeholders to provide their customers with the best possible service and maximum time-in-operation.

---

[18] *Id*.

[19] *Id*.

[20] Wilson Rothman, "Exclusive: WiMax Uncapped Speed Tests," Gizmodo Review (Mar. 19, 2009), *available at* http://gizmodo.com/5174718/exclusive-wimax-uncapped-speed-tests.

[21] *Id*.

If the Commission does decide to impose such threshold metrics for outage reporting (and it should not), it must heed its own recognition that "wireless . . . networks include specific latency challenges not found in wireline-only networks."[22] Mobile wireless broadband remains a nascent technology, one that is just beginning to find its footing to compete against entrenched cable and wireline incumbents. Accordingly, while any additional reporting obligations are unnecessary, they are particularly unnecessary for mobile wireless, and any thresholds must account for the specific challenges faced by mobile wireless broadband service providers. Because accounting for the myriad different broadband technologies is next to impossible, the Commission is best served by continuing to rely on market competition to ensure reliable, effective service to broadband consumers.

III. THE COMMISSION LACKS THE LEGAL AUTHORITY TO IMPOSE OUTAGE REPORTING REQUIREMENTS ON BROADBAND INTERNET SERVICE PROVIDERS

The *NPRM* cites multiple alternative theories under which the Commission might seek to assert jurisdiction over broadband Internet service providers. As is discussed in detail below, none of these theories will withstand scrutiny. But, before delving into the legal analysis, the Commission should step back and ask itself whether it wants to regulate the Internet. The Internet has provided "the most open and accessible means of communication, idea sharing and expressive creativity that the world has ever seen. Introducing government regulation with all of its bureaucracy and inefficiency would ultimately create more problems that the issues such policy would supposedly address."[23] Recent Commission intrusions into the regulation of the Internet – for example, the Net Neutrality regulations – have generated controversy and

---

[22] *NPRM* at ¶ 27.

[23] Posting of Crain Englands to OpenInternet.gov http://openinternet.ideascale.com/a/dtd/Don-t-regulate-the-Internet-to-death./20681-6017 (Aug. 2010).

significant legislative opposition. The unifying theme of the opponents is that the Internet has grown and flourished without government interference and none is needed to continue this growth.

Nonetheless, the *NPRM* seeks comment on three disparate jurisdictional analyses, none of which pass muster. First, the Commission asserts that it may enact broadband outage reporting obligations pursuant to its ancillary authority under Section 4(i) of the Communications Act of 1934, as amended (the "Act").[24] Second, the Commission asserts authority over mobile wireless IPs pursuant to Sections 307(a), 309(j)(3) and 316(a)(1). Third, the Commission relies on Sections 4(o) and 4(k) of the Act, which permit it to collect data under certain circumstances as part of reports to Congress. Unfortunately for the Commission, none of these jurisdictional avenues are sufficient to provide it with authority to enact the unnecessary proposed reporting obligations with respect to broadband Internet service providers.

A. Requiring Broadband Internet Service Providers to Report Outages Exceeds the Commission's Ancillary Authority Under Title I

The *NPRM* suggests that "the network outage reporting proposals for broadband Internet service providers are reasonably ancillary to ensuring that interconnected VoIP providers are able to satisfy their 9-1-1 duties . . . because [such] services by definition depend on broadband networks."[25] This might sound good when said fast, but it misses the essential fact that Congress adopted rules only requiring that interconnected VoIP providers – not broadband Internet service providers – comply with E911 requirements. Specifically, Section 615a-1(a) of the Act states, "It shall be the duty of each IP-enabled voice service provider to provide 9-1-1 service and

---

[24] *NPRM* at ¶ 70.

[25] *Id*. at ¶ 69.

enhanced 9-1-1 service to its subscribers in accordance with the requirements."[26] Nowhere are broadband providers included in this mandate. The Commission is correct that it "may adopt rules implementing that requirement";[27] however, by the plain language of the statute, such rules are not intended to extend beyond the interconnected VoIP providers that the statute governs. The mere fact that interconnected VoIP rides over broadband facilities does not give the Commission unbounded authority to regulate the underlying broadband providers. Indeed, in the recent *Comcast* case, which is cited in the *NPRM*, the Commission was rebuked by the D.C. Circuit for failing to tie its "assertion of ancillary authority over Comcast's Internet service to any statutorily mandated responsibility."[28] While the Commission may theoretically be permitted to tie ancillary reporting obligations for interconnected VoIP providers to its powers under Section 615a-1, such power does not extend indefinitely to entities not subject to that section of the Act.

Permitting the Commission to exercise its ancillary authority so broadly as to capture broadband Internet service providers within language intended to regulate interconnected VoIP providers, would dangerously circumvent the important principle that the Commission acts only pursuant to authority Congress specifically delegates to it.[29] The Commission's rationale, "if accepted . . . would virtually free the Commission from its congressional tether."[30] In truth, interconnected VoIP is not the only communications medium that depends on the Internet.

---

[26] 47 U.S.C. § 615a-1(a).

[27] *NPRM* at ¶ 67.

[28] *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010).

[29] *See Id*. at 654 (stating that "administrative agencies may [act] only pursuant to authority delegated to them by Congress").

[30] *Id*. at 655.

SMS/MMS, broadcast radio programming (through stations offering online streaming), broadcast video programming (such as through Slingbox), mobile telephony services (such as through femtocells), among many others rely in large or small part on the underlying connectivity of the Internet. Is the Commission therefore able to apply regulatory burdens – ordinarily applicable only to the actual providers of those services – to broadband Internet service simply because it provides the underlying network? The answer is "NO" because such a result would fly in the face of Congress' stated directive to promote broadband deployment by "promot[ing] competitions . . . [and] remov[ing] barriers to infrastructure investment."[31] Imposing outage reporting requirements on broadband providers goes far beyond the ancillary authority granted to the Commission under Title I, and the Commission should exercise good sense and restraint in declining to pursue such regulations.

Further, such a requirement would unfairly impose obligations on some providers and not others who are similarly situated. For example, the Commission's proffered rules would reach mobile wireless Internet access providers but not WiFi hot spot providers, who are largely beyond the reach of the Commission. Since a significant amount of access to the Internet is via WiFi hot spots, it makes no sense for mobile wireless providers to have a reporting obligation while WiFi hot spot providers do not. This would burden mobile wireless Internet providers with costs that competing WiFi hot spot providers would not incur. Further, it begs the question of whether a mobile wireless Internet provider who also provides WiFi hot spots would be obligated to report a WiFi outage when the local Starbucks would not.

---

[31] 47 U.S.C. § 1302(a).

B. Title III Does Not Authorize the Commission to Impose Broadband Outage Reporting Obligations on Wireless Broadband Providers

The Commission also is not able to adopt its proposed broadband outage reporting obligations pursuant to Title III of the Act. As an initial matter, such a theory would fail to capture the entirety of the wireline broadband market. Promulgating broadband outage reporting rules under Title III would have the perverse result of further burdening mobile wireless broadband providers, who are already expending substantial resources in order to compete with their wireline counterparts. Further, as described earlier, the Commission would be unable to reach unlicensed operators – such as WiFi hot spots – under its licensing authority. This disparity creates inequities. Therefore, Title III should not be seen as an "additional" source of authority, as it covers only a small, nascent subset of mobile wireless broadband operators, while failing to govern the actions of entrenched wireline incumbents and also other unlicensed WiFi hot spot operators.

The *NPRM* cites Section 307(a) as a potential source of authority.[32] However, this section of the Act merely governs the granting of licenses to transmit signals over public airwaves, and is inapplicable to already-granted licenses, such as the ones at issue in this proceeding.[33] Section 309(j)(3), for its part, merely provides a vehicle to "establish a competitive bidding methodology."[34] While this section empowers the Commission to design procedures in such a way as to "include safeguards to protect the public interest" and to "seek to

---

[32] *NPRM* at ¶ 69.

[33] 47 U.S.C. § 307(a).

[34] 47 U.S.C. § 309(j)(3).

promote the purposes specified in section 1" of the Act, such power exists only on a prospective basis.[35]

The *NPRM* also cites Section 316(a) of the Act as a source of authority. Section 316(a) authorizes the modification of licenses if, "in the judgment of the Commission such action will promote the public interest convenience and necessity."[36] However, this provision does not apply broadly to rulemaking proceedings aimed at categories of licenses, as here. Rather, Section 316(a) "is concerned with the conduct and other facts peculiar to an individual licensee."[37] While it is true that when licenses are "modified" by a general rulemaking proceeding a licensee is not entitled to a separate Section 316 hearing, the section on its own grants no additional authority enabling the Commission to take actions within a rulemaking proceeding that it would not otherwise be able to take under its enumerated powers. Simply put, Section 316(a)(1) is not properly invoked as an independent source of statutory authority in a general rulemaking proceeding. Indeed, in past instances, the Commission has affirmatively argued that "section 316(a) is not applicable to the general rulemaking procedures here involved."[38] Because Section 316(a)(1) does not provide the Commission with independent authority to modify licenses beyond its other enumerated powers, it cannot stand as the source of authority to adopt broadband outage reporting requirements in this instance.

---

[35] *Id*.

[36] 47 U.S.C. § 316(a).

[37] *WBEN, Inc. v. United States*, 396 F.2d 601, 618-619 (2d Cir. 1968) (emphasis supplied).

[38] *California Citizens Band Association v. United States*, 375 F.2d 43, 50 (1967).

C. The Commission's Obligations Under Sections 4(o) and 4(k) of the Act Do Not Provide Authority to Require Broadband Outage Reporting

The Commission once again overreaches by seeking to justify its authority to promulgate broadband outage reporting rules for broadband service providers by citing Sections 4(o) and 4(k) of the Act.[39] Neither of these subsections provide the independent authority to require the additional regulatory burdens proposed in the *NPRM*. Section 4(k) merely states that the Commission "shall make an annual report to Congress . . . [which] shall contain . . . such information and data collected by the Commission as may be considered of value."[40] By its plain language this subsection merely requires the Commission to provide the Congress with data that it has collected, pursuant to its enumerated powers under the Act, that may promote the Congress' understanding of wire and radio communications regulation. Nowhere does this subsection suggest that the Commission is provided with unfettered power to collect any and all data from regulatees so long as it is "considered of value." This would lead to the absurd result that the Commission's information collection authority is boundless, and its annual report to Congress provides it with the ability to collect information in such a manner as would otherwise be inconsistent with the Act. Section 4(o) provides the Commission with the similarly limited directive to "investigate and study" issues concerning safety of life and property in connection with radio and wire communications.[41] As with Section 4(k), this must be read within the context of the Commission's other powers under the Act. It would be strange indeed for the Congress to limit the Commission's ability to regulate certain entities (such as broadband

---

[39] 47 U.S.C. §§ 154(k), (o).

[40] 47 U.S.C. § 154(k).

[41] 47 U.S.C. § 154(o).

Internet service providers) in one breath and to imbue the Commission with unending information collection authority in another.

IV. THE CURRENT OUTAGE REPORTING RULES SHOULD NOT BE EXTENDED TO INCLUDE AWS AND 700 MHZ LICENSEES OR OTHER NEW SPECTRUM BANDS OR WIRELESS TECHNOLOGIES

The *NPRM* also seeks comment on whether the current outage reporting rule "should be amended to state explicitly that the rule also applies to new services using spectrum bands or new wireless technologies that come into being after the adoption of the rule."[42] Alternatively, the Commission asks whether the rules should "be amended as to exclude AWS and 700 MHz providers from the reporting requirements because the services that they provide have not reached sufficiently high levels such that outage reporting would be desirable."[43] As noted in the introduction, the existing outage reporting obligations that apply to mobile wireless services are burdensome, and can actually interfere with efforts of carriers to restore services under the recent Executive Orders mandating the streamlining and reduction of agency regulations. The existing requirements should be relaxed, not extended to new categories of services. MetroPCS believes that competition and innovation are best served by not extending the current outage reporting rules to new spectrum bands or technologies, including AWS and 700 MHz. As the Commission well knows, technologies change with surprising speed, and predicting what may be the next paradigm shift in communications is a futile exercise. That being the case, the Commission should tread carefully regarding the extension of current obligations to new technologies, lest the development of those new technologies suffer. If it is impossible to know what the next wireless breakthrough will be, then it is impossible to know how the extension of regulatory obligations

---

[42] *NPRM* at ¶ 55.

[43] *Id*.

will affect them. A perfect example is AWS and 700 MHz spectrum. Many current licensees are experimenting with next generation wireless technologies (such as 4G LTE or VoLTE, among others), and the Commission should encourage the development of next-generation wireless services by making them as free as possible from burdensome regulatory oversight. Only by exercising regulatory restraint can the Commission ensure the continued growth and innovation that has defined the wireless industry and brought substantial benefits to all consumers.

Further, an exception of some, but not all mobile wireless operators would lead to an unlevel playing field. For example, Verizon Wireless is deploying its 4G LTE services on 700 MHz and would be benefited by any 700 MHz exclusion. However, MetroPCS in certain markets has deployed its 4G LTE on PCS and AWS frequencies. Both Verizon Wireless and MetroPCS' 4G LTE services are similarly nascent, but an exception for 700 MHz and AWS would mean that carriers using the same technology and would be subject to different requirements depending upon the historical account as to what frequency band is used. Thus, some outages would be reportable when others would not. This is truly the hallmark of an arbitrary and capricious rule.

V. CONCLUSION

The foregoing premises having been duly considered, MetroPCS respectfully requests that the Commission exercise regulatory restraint and refrain from imposing costly, burdensome and entirely unnecessary broadband outage reporting regulations. Even beyond the fact that the Commission lacks the legal authority to promulgate such reporting obligations, due to the myriad and complex broadband technologies, properly crafting any reporting standards is a near-impossible. Instead, the Commission should recognize that the Internet, at is core, is a redundant network designed to overcome isolated outages. Furthermore, market competition remains

highly effective at incenting broadband providers to provide the highest-quality, most consistent service to their customers and is the most effective mechanism to ensure providers offer error free, robust services. The Internet currently is flourishing because of, not in spite of, the Commission's light regulatory touch, and the Commission should not add additional regulatory burdens that may disturb this delicate balance.

Respectfully submitted,

MetroPCS Communications, Inc.

By:
Carl W. Northrop
Andrew Morentz
TELECOMMUNICATIONS LAW
PROFESSIONALS PLLC
875 15th Street, NW, Suite 750
Washington, DC 20005
Telephone: (202) 789-3120
Facsimile: (202) 789-3112

Mark A. Stachiw
General Counsel, Secretary
& Vice Chairman
MetroPCS Communications, Inc.
2250 Lakeside Blvd.
Richardson, Texas 75082
Telephone: (214) 570-5800
Facsimile: (866) 685-9618

Its Attorneys

August 8, 2011